No. 15,238

United States Court of Appeals

For the Ninth Circuit

WESTERN MACHINERY COMPANY,
a corporation,
Appellant,

vs.

NORTHWESTERN IMPROVEMENT CO.,
a corporation,
Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division. Honorable John C. Bowen, Judge.

APPELLANT'S OPENING BRIEF.

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I.

STATEMENT DISCLOSING JURISDICTION.

The United States District Court for the Western District of Washington, Northern Division, the trial court, had jurisdiction of this cause by virtue of authority granted by the Congress of the United States in Chapter 646, 62. Stat. 930; 28 U.S.C.A., Sec. 1332. The complaint of appellant (R. 3) and the amended answer of appellee (R. 5) disclose appellant

to be a corporation organized under the laws of and a citizen of the State of Utah, appellee to be a corporation organized under the laws of and a citizen of the State of Delaware, and the matter in controversy to exceed the sum of $3,000.00, exclusive of interest and costs.

This appeal is from a final judgment rendered in the United States District Court for the Western District of Washington, Northern Division, against appellant (R. 22). This court has jurisdiction to review such judgment by virtue of Chapter 655, 65 Stat. 726; 28 U.S.C.A., Sec. 1291.

II.

STATEMENT OF THE CASE.

Appellant, Western Machinery Company, is a corporation engaged in the business of manufacturing and selling mining machinery and equipment. Appellee, Northwestern Improvement Co., is a whollyowned subsidiary corporation of the Northern Pacific Railroad. Bellingham Coal Mines Company is a corporation engaged in the mining, processing and marketing of coal from its mine located at Bellingham, Washington.

Sometime prior to 1952, Bellingham Coal Mines Company and Earl R. McMillan, on behalf of appellee, negotiated and entered into an agreement whereby appellee was to operate Bellingham's coal mine. By this agreement appellee was to rehabilitate, manage

and operate the coal mine, to furnish from appellee's own employees such management and operating personnel as was required, and to furnish such supplies and equipment as appellee might conveniently be able to supply. In exchange therefor Bellingham Coal Mines Company agreed to reimburse appellee for all costs and expenses incurred by appellee in connection therewith, and in addition to pay to appellee a fixed fee of twenty per cent thereof.

The operation of the coal mine was under the direct and personal supervision of Mr. McMillan, who became General Manager, Vice President and a director of Bellingham Coal Mines Company. Mr. McMillan was at the same time manager of appellee's coal operations, being the only official of Northwestern Improvement Co. located in the State of Washington.

Early in 1952, J. Stanley Huckaba, then one of appellant's sales representatives, and Mr. McMillan entered into negotiations for the sale by appellant of a coal washing plant to be installed at the coal mine site. On February 20, 1952, a written price quotation was submitted by Mr. Huckaba to Northwestern Improvement Co. This quotation was accepted and signed "Northwestern Improvement Co., Earl R. McMillan, Manager of Coal Operations" (Plf. Ex. 1). A few days later Mr. McMillan, on behalf of and on the letterhead of appellee, confirmed the order (Plf. Ex. 2). From time to time as components of the coal washing plant were shipped appellant sent bills therefor to appellee which were received by Mr. McMillan. As installation neared completion, Mr. McMillan and rep-

resentatives of appellant discussed arrangements for payment of the purchase price (R. 146-148). Thereafter through arrangements made by Mr. McMillan, appellant received $15,000.00 from Bellingham Coal Mines Company to apply on the purchase price of the machinery. The installation was completed August 22, 1952, and the installation and operation were certified satisfactory by Mr. McMillan August 29, 1952 (Def. Ex. A-14). A final bill was sent to and approved by appellee on or about August 15, 1952 (Def. Ex. A-4).

On or about August 23, 1952 (Find. VII, R. 12), one day after completion of installation of the coal washing plant, appellant received from Bellingham Coal Mines Company its promissory note (Def. Ex. A-6) in an amount equal to the balance of the purchase price for the coal washing plant. Before its delivery, the note was approved by Mr. McMillan and its delivery to appellant authorized by him. The note by its terms payable at any time on or before November 18, 1952, was not paid. This action was brought against Northwestern Improvement Co. February 9, 1955, to recover the balance of the purchase price of the coal washing plant. Judgment was rendered against appellant dismissing this action with prejudice. After trial the district court was of the opinion that Bellingham Coal Mines Company was the purchaser of the machinery and appellee a surety only. The court found the unpaid balance to be $48,445.47, but it was of the further opinion that appellant had been discharged by operation of law when Bellingham Coal Mines Company issued its note to appellant.

This appeal involves the following questions:

1. Can the terms of this written contract between the parties be varied by parol evidence?

2. Was appellee a principal debtor for the purchase price of the coal washing plant?

3. Did appellant know that appellee was a surety?

4. If not a principal debtor, was appellee a compensated or voluntary surety?

5. Was there an extention of time?

6. Was there a binding agreement between appellant and Bellingham Coal Mines Company extending the time for payment of the purchase price of the coal washing plant?

7. Did appellee consent to the extension of time, if any?

8. Is appellee estopped to deny its consent to the extension of time, if any?

9. Did appellee sustain the burden of proving its Affirmative Defenses I and IV?

These questions are raised by the pleadings, by appropriate and timely objections during trial, by appellant's statement of points (R. 255), and by the following specifications of errors.

III.

SPECIFICATION OF ERRORS.

1. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"II

That plaintiff sold and delivered coal-washing machinery to Bellingham Coal Mines Company for use in its coal mine at Bellingham, Washington, upon a written price quotation dated February 20, 1952, from plaintiff, signed by defendant, introduced in evidence as plaintiff's Exhibit Number 1, and a written acceptance dated February 25, 1952, from the defendant, Northwestern Improvement Company, as the operating manager of Bellingham Coal Mines Company, which acceptance was introduced in evidence as plaintiff's Exhibit Number 2. That even though said quotation of February 20, 1952, and the acceptance of February 25, 1952, were in defendant's name, plaintiff at all times knew, as explained in Exhibit Number 2, that said coal-washing plant was for the use of Bellingham Coal Mines Company and that Bellingham Coal Mines Company would receive the entire benefit of said coal-washing plant."

Instead of finding II, the district court should have found under the evidence that defendant purchased the coal washing wachinery on its own account.

2. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"III

That by said quotation dated February 20, 1952, and said acceptance dated February 25, 1952, the defendant, to expedite the delivery of said coal-washing plant to Bellingham Coal Mines Company, as purchaser, lent its name for credit

purposes only and thereby became a surety for Bellingham Coal Mines Company to pay for the purchase price of said coal-washing plant as shown on Exhibits 1 and 2."

Instead of said finding, the district court should have found under the evidence that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff as purchaser and not as surety, to pay the purchase price.

3. (a) On cross-examination of Mr. Huckaba, Mr. Roger J. Crosby, attorney for appellee, propounded a series of questions to elicit from the witness testimony to the effect that appellee and Bellingham Coal Mines Company were separate companies and that the witness had been advised that appellee had been employed by Bellingham Coal Mines Company for management purposes, and that the approval of the board of directors of Bellingham Coal Mines Company was required before the machinery could be purchased (beginning R. 38, 45 and 53). Mr. Arthur P. Shapro, attorney for appellant, objected to the testimony and to defendant's Exhibits 1, 2 and 3 as follows:

"Mr. Shapro. Your Honor, I object to that question upon the ground that it is incompetent, irrelevant and immaterial and that it is an attempt to violate the parol evidence rule and to vary the terms of a written instrument by parol." (R. 38 and 39.)

Mr. Shapro. Furthermore, since it represents, as he has testified, a part of his report of negotiations leading up to the document which has been

admitted as Plaintiff's Exhibit 1 and also the confirmation, Plaintiff's Exhibit No. 2, and was dated and executed prior to that date, it must as a matter of law be deemed as negotiations merged in the subsequent contract and as such is not admissible." (R. 45, 46.)

Mr. Shapro. To which offer (Def. Ex. A-1 and A-2), your Honor, we object upon the ground that no proper foundation has been laid, and upon the further ground that by the answer of the witness to the question propounded by Counsel that the notes, A-1 and A-2, the reports culminated in the sale which is recorded in Plaintiff's Exhibits 1 and 2, we have the same ground, namely that it was merged in the written instrument of a later date and, therefore, it would be a violation of the parol evidence rule to admit it." (R. 53.)

(b) On direct examination of Mr. Huckaba as appellee's witness, Mr. Crosby propounded a series of questions to elicit from the witness testimony to the effect that appellee signed the contract as surety only (beginning R. 90). Mr. Shapro objected to the testimony and to defendant's Exhibits A-1, A-2, A-3, A-11, A-12 and A-13 as follows:

"Mr. Shapro. I object to the question, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue in this case and is hearsay by reason of being merged in Plaintiff's Exhibit 1 which is the subject matter of and to which the witness has already testified was preceded by these previous quotations and negotiations." (R. 90.)

(c) On direct examination of Mr. McMillan, Mr. Crosby propounded a series of questions to elicit testimony regarding negotiations and discussions prior to the date of the contract to the effect that Mr. Huckaba knew that appellee signed the contract as surety only (beginning R. 138) and that the machinery was purchased and paid for by the Bellingham Coal Mines Company (beginning R. 174) Mr. Shapro objected as follows:

> "Mr. Shapro. I object to that question, if your Honor please, on several grounds. The first ground is it's too general, and secondly that if it is intended to elicit any discussions which led up to and were included in the contract of February 20th, that it would be an attempt by parol to vary the terms of a written instrument, and those discussions would be merged in the instrument." (R. 138, 139.)
>
> Mr. Shapro. Your Honor, at this time may I move to strike the words and everything that follows 'with the understanding that' upon the grounds that it is the conclusion of the witness and also that it is an attempt by parol to vary the terms of a written instrument." (R. 174.)

(d) All other testimony of Mr. Huckaba and Mr. McMillan and others exhibits offered by appellee having the effect of varying, adding to or explaining the written contract (Plf. Ex. 1) in violation of the parol evidence rule was objected to, it being understood by the parties and the court that the above quoted objections applied.

4. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"IV

That the defendant did not have any agreement with said Bellingham Coal Mines Company to receive, nor did defendant receive, any money or other consideration as a result of the purchase of said coal-washing plant or for the act of becoming a surety for said Bellingham Coal Mines Company in the purchase of said plant. Defendant's assumption of liability for the purchase price of said coal-washing plant delivered to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1 and 2 was without consideration to defendant."

Instead of said finding, the district court should have found that defendant received consideration as purchaser of the coal-washing plant or that if Bellingham Coal Mines Company was purchaser of said coal-washing plant that defendant became surety, sharing, however, in the consideration running to Bellingham Coal Mines Company and also receiving an independent consideration.

5. Error of the district court in making the following finding of fact which the evidence before the court does not support, except those portions specifying the original purchase price, the dates and amounts of payments, the payor, payee, and the unpaid balance, which are correct and in accordance with the evidence:

"V

That by reason of the purchase and sale of said coal-washing plant, the Bellingham Coal Mines Company became indebted to plaintiff in the sum of $71,038.71, for which amount defendant was surety; that said account was due and payable on or before the 31st day of July, 1952; that on or about August 15, 1952, Bellingham Coal Mines Company paid $15,000.00 to plaintiff in reduction of the account for which defendant was surety. That subsequent to November 18, 1952, Bellingham Coal Mines Company paid on the obligation for which defendant was surety, the additional sum of $7,593.24, leaving $48,445.47 unpaid."

Instead of the objectionable portions of said finding, the district court should have found that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff as purchaser and not as surety; and further that said account was not due and payable until the installation of the coal-washing plant was completed and accepted.

6. Error of the district court in making the following portion of finding VI which the evidence before the court does not support:

"... The Court finds that no additional consideration in fact was paid or received by defendant on account of, and the defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note."

Instead of said portion of finding VI, the court should have found that defendant received consideration for

the execution of the promissory note by Bellingham Coal Mines Company and its delivery to plaintiff; that the manager of coal operations of defendant had actual and apparent authority to consent to and approve on behalf of defendant said execution and delivery of said note; that defendant in fact had actual knowledge of, acquiesced in, consented to and approved said execution and delivery of said note.

7. Error of the district court in making the following portion of finding VII which evidence before the court does not support:

> ". . . that by said promissory note, plaintiff extended to Bellingham Coal Mines Company without the consent or approval of defendant, the time for payment of the balance due on said coal-washing plant to November 18, 1952."

Instead of said portion of finding VII, the district court should have found that payment of the purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

8. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"II

That plaintiff sustained the burden of proof, to the extent that it sold and delivered goods, wares and merchandise of the reasonable value of $71,038.71 to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1, 2 and 4, for which defendant became a surety to plaintiff for the sum of $71,038.71; that there is presently due and owing $48,445.47 of the amount for which defendant was surety."

Instead of such conclusion, the district court should have entered its conclusion of law that the plaintiff sustained the burden of proving that it sold goods, wares and merchandise of the agreed and reasonable value of $71,038.71 to defendant, and that defendant is presently indebted to plaintiff in the amount of $48,445.47.

9. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"III

That defendant was a surety for Bellingham Coal Mines Company, and Bellingham Coal Mines Company was the principal, in the purchase of a coal-washing plant by said Bellingham Coal Mines Company from plaintiff on or about February 25, 1952."

10. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"IV

That defendant sustained the burden of proof under its first affirmative defense to both first and second counts of plaintiff's complaint; that defendant did not, nor was defendant entitled to, receive any consideration for the assumption of liability as a result of the purchase by Bellingham Coal Mines Company of said coal-washing plant from plaintiff."

Instead of said conclusion, the district court should have entered its conclusion of law that if in fact defendant was a surety, it shared in the consideration running to Bellingham Coal Mines Company and also received an independent consideration therefor.

11. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"VI

That defendant has sustained the burden of proof as to its fourth affirmative defense to both first and second counts of plaintiff's complaint. That by a valid agreement, plaintiff, without reserving any rights it may have had against defendant, extended to defendant's principal, Bellingham Coal Mines Company, the time for payment of the balance due on the purchase of said coal-washing plant, for which obligation defendant was a surety, thereby discharging the defendant from its obligation as surety."

Instead of said conclusion, the district court should have entered its conclusion of law that payment of the

purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

12. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"VII

That a judgment and decree should be entered herein, dismissing all counts of plaintiff's complaint, with prejudice, and that the defendant is entitled to have a judgment against the plaintiff for its costs and disbursements herein."

Instead of said conclusion, the district court should have entered its conclusion of law that plaintiff is entitled to judgment against defendant in the amount of $48,445.47, plus legal interest, and for its costs and disbursements.

13. Error of the district court in entering judgment dismissing all counts of plaintiff's complaint with prejudice and with costs to defendant. Instead thereof, the district court should have rendered judgment for plaintiff against defendant in the amount of $48,445.47 plus legal interest and for plaintiff's costs and disbursements incurred.

IV.

SUMMARY OF ARGUMENT.

A. Parol Evidence is Inadmissible to Vary the Terms of a Contract.

B. Appellee Was a Principal Debtor.

C. Appellee Was Not Discharged, Even if a Surety.

1. Appellant was without knowledge that appellee was a surety.
2. Appellee, if a surety, was a compensated surety.
3. There was no extension of time.
4. There was no binding agreement extending the time for payment.
5. Appellee consented to the extension of time and is estopped to deny its consent.
6. Appellee failed to sustain its burden of proving its affirmative defenses.

V.

ARGUMENT.

A. PAROL EVIDENCE IS INADMISSIBLE TO VARY THE TERMS OF A CONTRACT.

The district court obtained jurisdiction as previously noted by virtue of the diversity of citizenship of the parties. In such cases, and in all matters of substantive law, a federal court is required to follow

and apply the state law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188.

The parol evidence rule is not a rule of evidence, but is a rule of substantive law, and since *Erie Railroad Co. v. Tompkins,* this has become the accepted view. *In re United Public Utilities Corporation* (D.C. Delaware) 52 Fed. Supp. 975; *American Crystal Sugar Co. v. Nicholas* (C.C.A. 10) 124 F. 2d 477; *Wigmore on Evidence,* 3rd Edition, Vol. 9, Sec. 2400. The Court of Appeals for the Second Circuit in *Zell v. American Seating Co.,* 138 F. 2d 643, stated:

> "But the federal courts have held, in line with what has become the customary doctrine in most states, that it (the parol evidence rule) is a rule of substantive law. . . ."

The contract upon which this action is based was entered into in the State of Washington and called for performance to be made in the State of Washington, and therefore the substantive laws of this state apply to the construction and interpretation of the contract and all other matters relating to it. The Supreme Court of the State of Washington has announced its construction and application of the parol evidence rule relating to written agreements.

In *Karatofski v. Hampton,* 135 Wash. 139, 237 Pac. 17, the parties entered into a written agreement whereby Industrial Loan & Investment Company contracted to sell timberland to the Orting Lumber Company and to S. W. Hampton and wife. The contract recited that the Orting Lumber Company, Hampton

and wife, and Industrial Loan & Investment Company were the parties. The contract was signed as follows:

> "Industrial Loan & Investment Company, by J. G. Newbegin, Its President. Attest Elva R. Schroder, Its Secretary.
> Orting Lumber Company, by S. Wade Hampton, Its President. Attest W. E. Hampton, Its Secretary.
> S. Wade Hampton. Hildegard Hampton."

Payments as prescribed by the contract were not made and Industrial Loan & Investment Company brought suit against the Hamptons.

The Hamptons claimed as a defense that they signed the original contract as sureties, and upon trial sought to establish by oral testimony that it was the intention of the parties at the time they signed the original agreement that the Hamptons sign as sureties only and not as principals. In holding that parol evidence was inadmissible to show that the Hamptons signed as sureties and not as principals, the court stated:

> "This is out of harmony with the express recital in the contract as above quoted which makes them parties as principals. It is also out of harmony with the legal effect of their signing the contract individually. To hold the appellants could by oral testimony dispute the recital in the contract and the legal effect of their signing individually would be a violation of that rule of evidence which provides that a written contract cannot be varied or modified by oral testimony."

The *Karatofski* case is determinative of the parol evidence issue now before the court. The contract

shows the parties to be appellant and appellee. It is signed by appellant and appellee and by no one else. The instrument is free from ambiguity, and parol evidence to show that appellee signed in some capacity other than as clearly appears on the face of the instrument falls within the ban of the *Karatofski* case.

Appellant made repeated and timely objections to testimony of Mr. Huckaba and Mr. McMillan which was elicited for the purpose of altering the terms of the written contract, by attempting to show that appellee signed the instrument as surety and not as the principal debtor, and that appellant knew it. Exhibits A-1, A-2, A-3, A-4, A-11, A-12 and A-13 were offered by appellee and admitted in violation of the parol evidence rule and over appellant's objection for the purpose of showing that appellant knew that Mr. McMillan had to obtain the approval of the board of directors of Bellingham Coal Mines Company before purchasing the machinery. This testimony was, of course, for the ultimate purpose of going behind the contract to show that Northwestern Improvement Co. was not the purchaser. Likewise, the testimony of Mr. McMillan (R. 174) to the effect that appellee's name was substituted in place of Bellingham Coal Mines Company's name on the contract (Plf. Ex. 1) for credit purposes only, and that the parties understood that Bellingham Coal Mines Company was the purchaser and would pay for the equipment, was for the purpose of showing that appellee was a surety only. All of this testimony and said exhibits should have been excluded from evidence because elicited and

offered for the purpose of showing appellee a surety rather than a principal debtor. The contract was clear and unambiguous and parol evidence to vary its terms was inadmissible and should have been excluded from evidence by the trial court.

B. APPELLEE WAS A PRINCIPAL DEBTOR.

The contract for the purchase of machinery (Plf. Ex. 1) was entered into by and between Western Machinery Company as seller and Northwestern Improvement Co. as purchaser; it described sufficiently the property sold and set forth the purchase price; it was signed by Mr. McMillan as Manager of Coal Operations of appellee. The contract is clear and without ambiguity. If appellee intended to become a surety, it would have been simple indeed for it to have signified such intent. It would have been enough were the signature preceded by some words such as "We guarantee payment of this order", or "We agree to pay if Bellingham Coal Mines Company does not", or even had the words "As surety" qualified its signature.

Appellee, however, took none of these precautions. Instead Northwestern Improvement Co. inserted and signed its name as purchaser without reservation or qualification. The name Bellingham Coal Mines Company does not appear in any shape, manner or form on the contract as a contracting party or otherwise.

It appears from the testimony of Mr. Huckaba and Mr. McMillan throughout the record that Mr. Huck-

aba negotiated exclusively with Mr. McMillan. Mr. Huckaba testified that the machinery was sold to Northwestern Improvement Co., the appellee (R. 31). As part of appellee's case, Mr. Huckaba testified on re-cross-examination that he asked Mr. McMillan to place the order in appellee's name because Western Machinery Company would be able to accept an order from Northwestern Improvement Co. placed on open account, because credit for Bellingham Coal Mines Company would not be extended by the San Francisco office of appellant (R. 130).

Further, it is undisputed that appellee, though owning no proprietary interest in Bellingham Coal Mines Company, had previously entered into a management contract with the latter. Under the management contract, appellee was to manage the entire coal operations of Bellingham Coal Mines Company, and was to be reimbursed for all labor, materials, supplies and equipment furnished by appellee, *plus* twenty per cent of the cost or value thereof, as compensation for its services. Because of this financial arrangement with Bellingham Coal Mines Company, appellee could safely assent to Mr. Huckaba's request that the order be placed in appellee's name, knowing that upon approval of the board of directors of Bellingham Coal Mines Company, appellee could safely purchase the machinery for its own account and obtain reimbursement from Bellingham Coal Mines Company under the terms of the management contract. But apart from the machinery itself, appellee's agreement to pay therefor was supported by a valuable consideration. Consideration is defined by Williston as:

> "Mutual promises in each of which the promisor undertakes some act or forebearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void are sufficient consideration for one another." Selections from *Williston on Contracts,* Sec. 103 (f) p. 142.

By addition of the new coal washing machinery, the productive capacity of the coal mine was increased. Surely there could be no other reason for acquiring the machinery. This being so, the management contract between Bellingham Coal Mines Company and appellee could be expected to increase in value as productivity, necessitating additional management service, supplies and equipment, increased. It is readily apparent that were it not for the management contract appellee would have no interest whatever in the development program of the mining company, and would not have committed itself to a liability in excess of $70,000. In addition to appellant's promise to furnish and install the machinery, Northwestern Improvement Co. received the benefit of a more valuable management contract.

Further consideration is found where appellee directed appellant as follows:

> "Please see to it that the routing of all equipment shipped on our orders to Bellingham gives maximum proportion of movement via Northern Pacific." (Plf. Ex. 2).

In discussing the elements of consideration, Williston points out that,

> "It would be a detriment to the promisee in a legal sense if he at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obligated to perform." Ibid., Sec. 102 A, p. 130.

Williston cites the following examples: "Thus, abstaining from smoking and drinking, though in fact in the particular case of benefit to the promisee's health, finances and morals, and of no benefit to the promisor, is a legal detriment and if requested as such is sufficient consideration for a promise." Ibid., Sec. 102 A, p. 130.

Mr. Williston next considers to whom the consideration must move, and states:

> "It is well settled that whether a benefit of the promisor is or is not a sufficient consideration, a detriment to the promisee is. This is equivalent to saying that if the promisee parts with something at the promisor's request, it is immaterial whether the promisor receives anything, and necessarily involves the conclusion that the consideration given by the promisee for a promise need not move to the promisor, but a move to anyone requested by the offeror." Ibid., Sec. 113, p. 156; *Restatement of Contracts,* Sec. 75 (2).

It is undisputed that appellee is a wholly-owned subsidiary of Northern Pacific Railway Company. It would seem a benefit to appellee to have shipments routed via Northern Pacific when possible. In fact, almost $1,000.00 in freight charges was paid to Northern Pacific for shipments of components of the coal

washing plant (Plf. Ex. 3). But irrespective of benefit to appellee, the promise to ship via Northern Pacific was a detriment to appellant because appellant was under no legal obligation to do so. Even if the benefit of that promise is deemed to have been received by a third party, Northern Pacific, the request therefor by appellee and the promise by appellant constituted a valid legal consideration which should bind appellee as principal, regardless of whether it be considered purchaser of the machinery.

At this point, appellant directs the court's attention to Finding of Fact IV (R. 11) and Conclusion of Law IV (R. 14) and to appellee's First Affirmative Defense (R. 6, 8). Appellee alleged in its affirmative defense and the district court found that appellee's assumption of liability for the purchase price of the machinery was without consideration to appellee. If this affirmative defense and finding mean that there was no consideration whatever for the assumption of liability, then the finding is clearly erroneous and the affirmative defense not proved, as the machinery was sold on appellee's credit and it would not have then been sold had not appellee promised to pay therefor. Appellee's agreement to pay the purchase price was the inducement for the sale of the machinery which was worth over $70,000.00. Certainly the sale of machinery, whether to appellee or Bellingham Coal Mines Company, was a sufficient consideration for appellee's promise.

If, on the other hand, the finding and affirmative defense mean that there was a consideration for the

assumption of liability but that it ran to a third party rather than to appellee, then the finding is unintelligible and meaningless and the affirmative defense no defense at all. Appellee was nevertheless bound to pay the purchase price whether the consideration ran to it or to Bellingham Coal Mines Company, as shown by the quotation from Williston above. The finding even so construed is erroneous, because appellee did receive a consideration for its promise to pay the purchase price. This consideration consisted of appellant's promise to ship via Northern Pacific and in the enhancement in value of the management contract.

Whichever view of Finding of Fact IV may be adopted, this finding is clearly and patently erroneous. The trial court failed to distinguish between compensation and legal consideration. The importance of this distinction is emphasized in a Comment in Vol. 31, Washington Law Review, p. 76.

Although the machinery was to be installed at the coal mine site, appellee was nonetheless the principal obligor, if not in fact the owner of the machinery. At the time the contract was signed, the parties dealt with each other as the only parties to the contract. Whether prior to this time it was contemplated that Bellingham Coal Mines Company would sign the contract and incur the obligation to pay the purchase price is immaterial, and evidence relating to negotiations prior to the signing of the contract is not even relevant. The fact is that at the time the contract was entered into Bellingham's credit was not acceptable to appellant (R. 130). For the purpose of consummating the order,

appellee agreed to and did sign the contract in its own name and on its own behalf. When the order was sent to appellant's home office in San Francisco for approval, appellee's was the only name appearing thereon and approval of the order was undoubtedly on that basis. Appellee's letter to Mr. Huckaba (Plf. Ex. 2) clearly shows that the credit of Bellingham Coal Mines Company was not relied upon at all. Bellingham was not asked to sign the contract and it did not do so. On February 20, 1952, the date the contract was signed by appellee, Bellingham Coal Mines Company was not obligated to appellant. Had Bellingham Coal Mines Company that day stated, "We refuse to pay for the machinery," could it be said that appellant could then have sued Bellingham for breach of contract? The answer is obviously no.

No matter what label or classification is used to describe the status of appellee, one thing clearly stands out. It is that appellee held itself out as and was regarded by appellant as a principal obligor. This status it cannot escape, and being a principal obligor no extension of time to pay can discharge it. This result also follows should it be held that Bellingham Coal Mines Company was a principal obligor, too. From the district court's Finding of Fact III (R. 11) that appellee "lent its name for credit purposes only", the further finding that appellee "thereby became a surety for Bellingham Coal Mines Company" does not follow. That there may be two principal obligors on a single undertaking requires no citation of authority. It would have been more consistent with the record

had the district court found that by reason of the benefit derived by Bellingham Coal Mines Company and appellee, both incurred liability as principal obligors. Accordingly, the trial court's Finding of Fact III (R. 11) and Conclusion of Law III (R. 14) are erroneous.

C. APPELLEE WAS NOT DISCHARGED, EVEN IF A SURETY.

Appellee at the trial urged and the district court found that appellee signed the contract and became bound as a surety only; that Bellingham Coal Mines Company was the sole principal debtor, even though it did not sign the contract; that appellant extended the time of payment to Bellingham without appellee's consent; and that by so doing appellee was discharged from any liability to appellant for payment of the purchase price.

It has always been appellant's contention that appellee was a principal debtor and in no sense a surety. If in fact it was a surety, however, appellee had the burden of proving all the elements essential to constitute a discharge. This it has not done.

The general rule relating to discharge of a surety by an extension of time to the principal is:

> "If the creditor enters into a binding agreement with the principal debtor to extend the time of payment, the surety is discharged. This consequence does not follow unless the creditor's promise is definite enough to be enforced, and is supported by legal consideration. . . . Neither is the surety discharged . . . (3) when the surety

> consents to the extension, or (4) when the creditor was unaware of the existence of the suretyship relation when he extended the time of payment. As to compensated sureties, the modern tendency is to hold them liable, notwithstanding the extension of time, except to the extent that they can show actual injury caused by the extension agreement." *Simpson on Suretyship,* Sec. 73, p. 351.

Succinctly, appellee will not be discharged if (1) appellant was unaware that appellee was a surety, or (2) appellee was a compensated surety, or (3) there was no extension of time in fact, or (4) there was no binding agreement to extend the time, or (5) appellee consented to or is estopped to consent to the extension of time. These elements will now be discussed in order.

1. Appellant Was Without Knowledge That Appellee Was a Surety.

In order for an extension of time for payment to discharge a surety, it is necessary that the creditor be aware that the third party is in fact a surety. *The Restatement of the Law of Security* at page 301 states the rule as follows:

> "So long as the creditor is entitled to regard a person as a principal, the latter will not be allowed to claim as against the creditor the benefit of rules for the protection of sureties."

Appellant at all times dealt with and was entitled to regard appellee as the principal obligor for the payment of the purchase price of the coal-washing

plant. Negotiations for the sale were with Mr. McMillan, an agent of appellee. When it became apparent during these negotiations that the credit of Bellingham Coal Mines Company was doubtful and would require a complete investigation, it was agreed that appellee should place the order as purchaser and principal obligor (R. 130), and the contract was executed in a manner that can reflect no other understanding. The record contains no evidence that the parties at the time of the purchase used the word "surety" or were even thinking in suretyship terms. Mr. McMillan's statement at the trial that he did not intend to bind appellee in any manner (R. 248) certainly shows this to be so.

All bills, including the final bill, were in the name of and sent to appellee (Plf. Ex. 3, 4). Discussions regarding payment then took place between appellant and Mr. McMillan. Subsequently, apparently under some arrangement between appellee and Bellingham Coal Mines Company, the terms of which were unknown to appellant and concerning which the record is silent, a payment on the account was made by Bellingham Coal Mines Company. Thereafter appellant requested further payments from Bellingham and ultimately took its note.

Throughout, however, appellant regarded appellee as the principal debtor. Its liability was fixed by the contract. Bellingham Coal Mines Company did not sign the contract and was not regarded by appellant as obligated to appellant at all. Even though later payments were accepted from Bellingham, appellee

was, as to appellant, still the principal debtor, and appellant continued to consider it as such. There was no change of relation between Bellingham Coal Mines Company and appellee of which appellant had any knowledge and which could convert appellee's liability as principal into one as surety. This being so, appellant was at all times entitled to treat appellee as principal, which in fact it did.

The case of *Blumenthal v. Seroda,* 129 Me. 187, 151 Atl. 138, is remarkably similar to the case before the court. There a mortgagor, who conveyed the real estate to another who assumed the mortgage, claimed to be a surety thereby and entitled to be discharged by an extension of time to the grantee made without the mortgagor's consent. The court held that knowledge by the mortgagee that the mortgagor is a surety must be shown and that the trial court's failure to give the jury an instruction thereon was error. The court stated:

> "But, it being also essential that the creditor should assent to the arrangement between his debtor and the debtor's grantee in order to relieve his debtor from primary liability, it is of course necessary that the creditor should know of the arrangement. One cannot well assent to that of which one is ignorant. 'If the extension of time of payment is to release the mortgagor, the creditor must know that the one to whom he granted the extension was a principal and the other a surety.' 2 Washburn Real Property (4th Ed.) 218. Upon well-settled principles, notice must be brought home to the holder of the mortgage before he can be charged with having vio-

lated the right of the maker of the note as a surety by extending the time of payment.

When one of two obligors in a bond claims release against the holder of the bond on the ground that he is surety for his co-obligor, and the creditor has given time to the principal debtor without the consent of the surety . . . the surety, to entitle itself to exemption from liability, must show that the facts of the suretyship were communicated to the creditor. The privilege of the surety is a mere equity, and can only be binding on those who have notice of its existence. *Kaighn, et al. v. Fuller, et al.,* 14 N. J. Equity 419. . . .

The surety who sets up in his defense an extension without his consent must allege and prove that the holder of the obligation had notice of the suretyship. If the creditor does not know of it when he grants the extension, the surety is not thereby discharged. 1 Brandt, Suretyship and Guarantee (3rd Ed.) Sec. 412; . . .

* * * * * * *

There is no direct evidence that the plaintiff (mortgagee) knew that payee (grantee) had assumed payment of the mortgage debt."

In the case before the court, appellee's original obligation created by the contract was that of principal, for no other party was bound to pay for the machinery. If appellee's obligation changed to that of surety by virtue of Bellingham Coal Mines Company's assuming the debt for the purchase price, knowledge of this change should have been brought home to appellant. In fact, appellant did not know of any such arrangement between Bellingham Coal Mines Com-

pany and appellee at the time the promissory note was accepted. The record is completely barren of any evidence which would tend to show that Bellingham Coal Mines Company became substituted (with appellee's consent) as debtor to appellant for appellee, or that such arrangement was ever brought to the attention of appellant, or that appellant ever assented to such an arrangement. There was no consideration running to Bellingham Coal Mines Company for the execution and delivery to appellant of the promissory note (Def. Ex. A-6) because Bellingham was not liable to appellant for the purchase price of the coal-washing plant. As shown by the *Blumenthal* case, the mere acceptance of payments on a debt from one other than the principal debtor does not in any way tend to show that the third party has assumed the obligation or that the creditor knew thereof or assented thereto. Accordingly, an extension of time to the third party, Bellingham Coal Mines Company, in this case, cannot in any way affect the rights of the creditor, appellant, against the principal debtor, appellee.

2. Appellee, If a Surety, Was a Compensated Surety.

Aside from the consideration necessary to bind appellee as a simple surety, appellee received additional independent consideration from appellant sufficient to put appellee in the class of a compensated surety. This additional consideration consisted partly of the promise of appellant to make maximum shipment via Northern Pacific Railway. As pointed out above, this promise was a legal detriment to appellant in that it was a promise to do something it had no

obligation to do. The benefit to appellee, as pointed out above, consisted of the right to designate how shipments should be made. Additional consideration is also found in the opportunity to make appellee's management contract more valuable by increasing productivity with the use of the machinery purchased. These two additional considerations the ordinary surety does not get. Because of these extra benefits to appellee, it should be set apart from the ordinary surety and regarded as a compensated surety whose contract is not *strictissimi juris.*

The case of *Holmes v. Elder,* 170 Tenn. 257, 94 S.W. (2d) 390, involved the consideration of the rules applicable to sureties who are not mere volunteer or accommodation sureties. The Gibson County Bank gave its bond to a depositor, and certain officers and stockholders of the bank signed as sureties. The sureties contended their obligations were to be strictly construed in accordance with the *strictissimi juris* doctrine. The court disagreed, saying:

> "However, conceding that the contract here is one of suretyship, the rule is one for guidance in construction only, and is subject to the basic rule that the instrument is to be considered as a whole, in the light of the circumstances surrounding its making, with the primary purpose of ascertaining just what was within the contemplation of the parties.
>
> And just here, as bearing on the application in the instant case of the stricti juris rule invoked, it will be borne in mind that this rule of construction is not applied in all cases of suretyship. Quite

generally it is confined to cases of volunteer, uncompensated accommodation sureties, and not extended to corporate or other paid sureties.

Now, while the bond before us is not a corporate bond, or one for which it appears that a consideration was directly paid, when the underlying reasoning is considered an analogy is apparent. The signers are the president and the cashier and other officers and stockholders of the principal obligor; prima facie they drafted the instrument they signed, and they became parties to the obligation for the purpose, not alone of securing to this depositor the repayment of trust funds coming into his hands officially, but of securing to themselves, through the institution which they officered and in part owned, the financial benefits incident to the use in handling of such funds. Indeed, their relation to this contract of indemnity, while on the face thereof and technically that of sureties, partook, in substance and in fact, of that of principal. So that, we are not inclined to adopt the view that special and tender consideration commonly accorded personal, uncompensated sureties is due respondent here."

Appellee in no case can be called a volunteer, accommodation or uncompensated surety. Appellee, in addition to the consideration referred to above, had an interest in the Bellingham Coal Mines Company to protect, even though it may not have been proprietary in nature. Its interest was in the prosperity of Bellingham Coal Mines Company, without which appellee could not have expected to receive the agreed compensation under the management contract. In this

respect, appellee's interest was identical to that of the president and cashier and the other non-stockholders sureties in the *Holmes* case, supra. Appellee was not the surety who guarantees his friend's note. Nor was it the mere creditor who became surety for his debtor with the hope of a future payment by the debtor. Appellee was inextricably bound up in the operation and life of Bellingham Coal Mines Company, and can in no way be identified with the friend or creditor who is the true volunteer, accommodation surety. Appellee should be treated as and governed by the rules applicable to compensated sureties.

3. There Was No Extension of Time.

The general rule applicable to the facts of this case is stated in *Corpus Juris Secundum* under the heading, "Where Maturity of Principal Debt or Period of Surety's Obligation Indefinite", as follows:

> "If no definite time of payment for the principal obligation is fixed, an agreement fixing a definite time of payment is not an extension discharging the surety."

The Supreme Court of Appeals of Virginia, in holding that a surety who guaranteed payment of a bank deposit was not discharged, stated:

> "Where there is nothing to show when the principal debt matures, there can be no such extension of time as to discharge the guarantors." *Looney v. Belcher,* 169 Va. 160, 192 S.E. 891.

The contract (Plf. Ex. 1) which constituted the agreement between the parties does not provide when

delivery of the machinery should be completed, nor when payment therefor should be made. From time to time components of the coal-washing plant were shipped to the coal mine site and billed to appellee (Plf. Ex. 3). When the final shipment was made, a final bill was prepared and forwarded to appellee on or about July 31, 1952 (Plf. Ex. 4) and approved by appellee on or about August 15, 1952 (Plf. Ex. 4). Contemporaneously with the transmittal of the bill and before installation was complete, discussions between the parties and Bellingham Coal Mines Company were had relative to arrangements for payment. On or about August 1, 1952, following final shipment of all components of the coal washing plant, appellant asked Mr. McMillan for a conditional bill of sale as security to appellant (Plf. Ex. 5). Mr. McMillan testified that he took the matter up with Mr. Ramage, president of Bellingham (R. 146). On or about August 10, 1952, further negotiations to this end took place between appellant and Mr. McMillan (R. 148). It appears also that a chattel mortgage on the machinery had been requested (R. 124). As a substitute for the conditional bill of sale or chattel mortgage, on or about August 20, 1952, appellant was offered a promissory note for the balance of the purchase price (R. 214), and on or about August 23, 1952, the note was delivered (Finding VII, R. 12).

Meanwhile, installation was in its final stages and on August 22, 1952, it was complete. Defendant's Exhibit A-14 shows this to be the completion date, as subsequent thereto all time of appellant's installation

supervisors was to be paid by Bellingham and not billed to appellant as was previously done.

Finally, issuance of a promissory note was discussed at meetings of the board of directors of Bellingham, at some of which Mr. McMillan was in attendance (R. 212). Issuance of the note was ultimately authorized and the note executed and sent to Mr. McMillan for approval before delivery. On August 23, 1952, the day after installation of the machinery was completed, the note was delivered to appellant (Def. Ex. A-9).

It is clear from this sequence of events that prior to the delivery and acceptance of the promissory note no time for payment of the purchase price had been agreed upon. In fact, the time and method of payment were the subject of extended discussions, all of which took place before installation had been completed. It was only upon acceptance of the promissory note by appellant that a date for payment was finally fixed. Accordingly, there was no extension of time which could discharge appellee.

4. There Was No Binding Agreement Extending the Time for Payment.

The district court held that the execution and delivery of the Bellingham Coal Mines Company note was an extension of time for the payment of the purchase price of the coal washing plant (Finding VII, R. 12). The note, however, was payable by its terms *on or before* a certain date and gave Bellingham Coal Mines Company the right to pay the note at any

time after execution and delivery (Def. Ex. A-6). Therefore, the agreement to extend time of payment lacks mutuality and is not binding.

The rule is stated in *Stearns Law of Suretyship,* 5th Edition, page 136, as follows:

> "In order for the agreement for extension of the time to discharge the surety, it must be mutually binding on both parties. If the principal may pay the debt at any time before the extended due date, the requirement of mutuality is not met and the surety is not released."

American Jurisprudence and *Corpus Juris Secundum* state the rule as follows:

> "The extension agreement must mutually bind both parties. If the obligor has the right to pay the debt at any time before the extended date, this mutuality is destroyed and the agreement is not valid." 50 Am. Jur. p. 946, Sec. 60.
>
> "An agreement for the extension of time must be supported by a sufficient consideration in order to effect the discharge of the surety. Mutuality is essential." 72 C.J.S. 656, Sec. 182.

The Washington court followed this rule in *Van de Ven v. Overlook Mining Co.,* 146 Wash. 332, 262 Pac. 981. There the following language was used to effect an extension of time of the payment of a note: "June 28, 1917, I hereby grant the extension of time of payment of the within note *on or before* six months from June 28, 1917, at 8%" (Emphasis added). The court held that this agreement gave the maker the right to pay the note at any time during the six

month period, and that the holder of the note would have been bound to accept payment at any time. The court in considering the general rule relating to extension of time stated:

> "The consideration moving to the holder of the instrument is the promise of the maker to pay interest during the full period of the extension, and the promise of the holder to forbear suit for the period constitutes a good consideration for the agreement on the part of the maker to pay interest for the full period." (Citations omitted.)
>
> "If the extension is for an indefinite time, in which the payor of the obligation extended had the right to pay at any time during the period of extension, there is no consideration moving to the holder of the instrument, nor is there a detriment to the promisor; this because the payee of the instrument gives up nothing, and the payor gives nothing; the payor may pay at any time, and the obligation stands, insofar as the payor is concerned, as it stood before the extension."

The rule is again stated in *Tsesmelis v. Sinton State Bank,* (Tex. 1932) 53 S.W. (2d) 461:

> "To support a contention that the payment of a negotiable instrument has been extended, there must exist all the elements essential to the execution of a contract . . . and the agreement for the extension must be for a definite time and mutually bind the parties, payor and payee, the one to forebear suit during the time of extension, and the other his right to pay the debt before the end of that time."

The court in finding no valid contract of extension stated that because the debtor had the right to pay the debt at any time, it was fatal to a claim of extension.

In *Kirby v. American State Bank,* (Tex. 1929) 18 S.W. (2d) 599, the court found an extension agreement invalid because the debtor could pay the debt at any time before the extended date, and stated:

> "It is clear from this language that the maker of the note was not obligated to pay interest for any definite time. He was privileged to pay the note under the agreement without incurring any obligation whatever for any additional interest over and above that already owing by him, if he desired to do so."

And in *Crossman v. Wohlaben,* 90 Ill. 537, 63 A.L.R. 1534, the court in finding that there was no valid extension agreement stated:

> "It is essential, in all such cases, that both parties should be bound by the agreement, or that it should have mutuality. The record in this case fails to show specifically that the principal debtor at any time bound himself to keep the money and pay the interest upon it for any specified time, or that he ever paid interest in advance."

Other cases announcing the same rule are *Heenan v. Howard,* 81 Ill. App. 629, *Keefer v. Valentine,* 199 Iowa 1337, 203 N.W. 787, and *Citizens Bank v. Douglas,* 178 Mo. App. 664, 161 S.W. 601.

Bellingham Coal Mines Company's promise to pay interest on the unpaid balance of the purchase price

was only a promise to do that which it was under a legal obligation to do. The rule in Washington is that interest is payable on an open account at the legal rate when the amount is definite, liquidated, or ascertainable by computation. *Mall Tool Co. v. Far West Equipment Co.,* 45 Wash. (2d) 158, 273 Pac. (2d) 652. The amount of the unpaid balance of the purchase price for the machinery has never been disputed. In fact, the final bill for the machinery was approved by Mr. McMillan (Plf. Ex. 4). In addition, by executing the promissory note, Bellingham acknowledged the amount thereof to be unpaid, and from that time appellant would have been entitled to interest at the legal rate even had the note not provided for interest. As a matter of fact, the note provided for interest at the rate of five per cent per annum while the legal rate in Washington prescribed by Rem. Rev. Stat. Sec. 7299 is six per cent per annum.

The promise of Bellingham Coal Mines Company contained in the note to pay the balance of the purchase price "on or before ninety days after date" did not obligate Bellingham to keep the money for any definite period of time. Likewise, its promise to pay interest on the balance "until paid" did not obligate Bellingham to pay interest for any definite period. Also, the incidental promise to pay attorneys' fees "in case suit or action is instituted to collect the note" did not definitely obligate Bellingham to pay attorneys' fees. If in fact there was consideration to Bellingham for said note and payment of the note could have been enforced by appellant, Bellingham

could have avoided any liability to pay interest for the full ninety days and could have avoided incurring any liability for attorneys' fees. This could have been done by paying the balance of the purchase price. This balance could have been paid the same day the note was issued, and in that event no interest whatsoever or attorneys' fees would have been payable. It is apparent, then, that appellant's promise to extend the time of payment, if such in fact it was, was unsupported by any binding promise of Bellingham or by other consideration.

5. Appellee Consented to the Extension of Time and Is Estopped to Deny Its Consent.

Throughout the entire transactions between the parties and Bellingham Coal Mines Company, Mr. McMillan was manager of Northwestern Improvement Co.'s coal operations, and the only official of appellee located in the State of Washington. At the same time, Mr. McMillan was operating manager, vice president, and a director of Bellingham Coal Mines Company. The entire negotiations relating to the purchase of the coal washing plant were with Mr. McMillan. He acted on behalf of Northwestern Improvement Co. and, apparently, Bellingham Coal Mines Company, too, in consummating the purchase of the machinery (R. 30, 97). The Seattle offices of appellee and Bellingham Coal Mines were identical (R. 135). It was Mr. McMillan who certified to the completion and satisfactory operation of the coal-washing plant (Finding X, R. 13). And it was Mr. McMillan who was instrumental in obtaining the ex-

ension of time upon which appellee bases its claimed lischarge. Mr. McMillan testified that he asked appel-ant's forbearance in demanding payment of the bal-nce due on the purchase price of the machinery (R. 84). He also testified that he consented to the issuance f the note along with the other members of the board f directors of Bellingham Coal Mines Company (R. 85). Mr. McMillan was familiar with the contents f the note and discussed it with Mr. Herbert S. ittle, secretary of Bellingham Coal Mines Company, rior to delivery of the note (R. 210, 211). Prior to he issuance of the note, Mr. McMillan had not in-ormed Mr. Little that the original order for the nachinery was signed by appellee, and not by Belling-am Coal Mines Company, nor that appellee was liable n any manner on the purchase of the machinery R. 207). Further, Mr. McMillan testified that in a elephone conversation with Mr. Goering of Western Machinery Company that he, Mr. McMillan, proposed hat a payment of $15,000.00 to $20,000.00 be made nd expressed the hope that appellant would forbear or a while (R. 183). It was under these circum-tances that appellant contends that appellee through Mr. McMillan, its manager of coal operations, con-ented to the execution and delivery of the note and o such extension of time as may have resulted there-rom.

A case directly in point is *Woodcock v. Oxford and Worcester Railway Co.,* 61 Engl. Rep. 551, 1 Drewry 521. There the railway company entered into an agreement with a contracting firm for the construc-

tion of a railway tunnel, and the contractor's attorneys signed as sureties on the contractor's performance bond. Disputes arose between the contractor and the railway company. Settlement was made, resulting in substantial change in the original contract, by virtue of which the sureties claimed to be discharged because effected without their consent. The court held that the sureties were estopped to deny that they consented to the changes in the agreement, as it appeared that

> ". . . Not only that the transactions on which they rely for their discharge was known to plaintiffs, but that they assisted, as the solicitors of the principal debtor, in the preparation of instruments for carrying into effect the arrangements of which they complain."

Another instance in which a person acting in two capacities was estopped to deny that he acted in both capacities is treated in *Thomasson v. Walker,* 168 Va. 247, 190 S.E. 309. There Blackford, owner of land subject to a deed of trust securing payment of bonds, was also the executor of an estate. Using estate funds, Blackford purchased the bonds from the holder and assigned them to the estate. He then sought and obtained from the holders of the deed of trust a release thereof, stating that the bonds had been paid. The property was then conveyed by Blackford. Blackford died and Thomasson, his successor as executor, brought suit against the holders of the trust deed for the wrongful release thereof. The court held that as to these defendants the estate was estopped to deny

ts participation in obtaining and its consent to the release of the deed of trust, and stated:

> "His (Blackford) agents set in motion the steps to secure the release, if in fact, they did not actually induce the execution thereof. He was responsible for the acts of these agents in the same degree as if he were acting himself. As one person, he was so intimately bound up in the whole transaction that it was impossible for him to have kept his left hand from knowing what his right hand was doing. He was a representative of the estate, chosen by the testatrix, and in a position to fully perform the duties and obligations connected therewith. Whether or not he represented the estate fairly and honestly, so far as others are concerned, the estate is bound by his act and the acts of his authorized agents."

In *Levy Brothers Co. v. Sole* and *Bulova Watch Co., Ltd. v. Sole,* 1955 Ontario Weekly Notes 989, the Court of Appeal found under facts similar to the case now before the court that the surety consented to the extension of time. There Fred Sole, the retiring partner, claimed to be a surety when the remaining partner, Ernest Sole, assumed the partnership debts owing to the plaintiffs. In reviewing the facts, the court stated:

> "The evidence shows that Fred supported his brother's efforts to obtain release and that he was present at the meeting of the parties in January, 1953, when the extension of time and reduction in the payments were granted. The correspondence in February, 1953, between Mr. Purvis, the secretary of the Levy Company, and Ernest sets out

> that Fred had discussed with the company the matter of an extension of time for payment of both the Levy Brothers and Bulova Watch Company debt. The evidence of Mr. Day, the president of the Bulova Company, is to the effect that Fred agreed to be responsible for the partnership debt until it was paid; also that when the several extensions of time for payment were under negotion Fred was a party to the discussions."

Likewise, Mr. McMillan discussed with representatives of appellant extensions of time of payment (Rec. 146-148). In fact, on one occasion Mr. McMillan made a trip to San Francisco for the express purpose of obtaining an extension (R. 149). He was informed of the proposed extension before the promissory note which constituted the extension of time was sent to appellant, and he approved its transmittal. Under these facts, appellee must be deemed to have consented to the extension, just as the surety was held to have done in the *Levy Brothers* and *Bulova Watch Company* cases.

Wyke v. Rogers, 42 Eng. Rep. 609 and *Gorman v. Dixon,* 26 Can. S.C. 87, hold that express consent can be established by conduct as well as from words. In *Austin v. Gibson,* 28 U.C.C.P. 554, the court, relying upon *Wyke v. Rogers,* supra, held that where one bound individually, as a principal, and as one of three executors of the surety's estate agreed to an extension of time, consent of the surety's estate to the extension was established by such conduct.

In *Westveer v. Landwehr,* 276 Mich. 326, 267 N.W. 849, principles of estoppel were applied under the following circumstances: Landwehr, one of eight directors of a country club, signed a bond guaranteeing payment of a loan to the country club by the bank. While Landwehr was still a director, the country club from time to time issued several renewals of the note evidencing the loan. When the bank finally sued Landwehr and the other guarantors, Landwehr claimed he was not liable because all of the directors did not sign the bond as was contemplated. Because Landwehr was a director of the country club during the entire period, took an active part in the affairs of the club, was present at club directors' meetings where renewals were discussed, and with other directors participated in securing renewals, the court held that Landwehr, as an individual, was estopped to deny his liability as an individual on the bond.

It is a well settled rule that mere knowledge by the surety of the extension agreement is not sufficient to prevent its release. Yet, it is also the rule that,

> "It is also possible for a situation to arise where it would be his (surety's) duty to speak unless he acquiesced." *Klise Lumber Co. v. Enkema,* 148 Minn. 5, 181 N.W. 201.

American Jurisprudence also states the rule as follows:

> "A surety, however, is bound by the rules of good faith and fair dealing, as well as other men. If, therefore, as agent for the principal debtor,

> he requests and obtains an extension of the time of payment without mentioning his liability as surety, he is estopped to assert that he is released by reason of his want of assent as such to the extension." 50 Am. Jur. 956, Sec. 72.

The Alabama Supreme Court in *Jemeson & Co., Inc. v. Ensey,* 228 Ala. 559, 154 So. 553, found that a person representing separate corporations has a duty to make it known on whose behalf he is acting. In that case, the plaintiff was negotiating with a man named Tanner, who was at the same time representing two different corporations, one a real estate company and the other a mortgage company. The court stated:

> "Plaintiff cannot be held to have dealt with one corporation at one moment and with another the next in one and the same transaction with the same officer, in the absence of notice of the change of parties. Knowledge on the part of the acting officer that the other party is dealing with him as representative of the one, renders it the contract of that one."

It is clear from these cases that the person who at the same time represents both the surety and the principal debtor in negotiations with the creditor has a duty to make clear to the creditor on whose behalf the person is dealing. In the case now before the court, Mr. McMillan, in arranging for the original purchase of the machinery, must necessarily have been acting on behalf of both Bellingham Coal Mines Company and appellee, if the court finds that appellee

was, in fact, a surety as to appellant. When the time arrived for fixing a date for payment, negotiations again were with Mr. McMillan. It was to Mr. McMillan that appellant first made its request for a conditional bill of sale. It was upon Mr. McMillan's approval that the note was finally delivered to appellant. The record is completely lacking in any testimony or proof that Mr. McMillan advised appellant on whose behalf he was dealing, whether it was on behalf of Bellingham Coal Mines Company, on behalf of appellee, or on behalf of both. In the absence of any notice to the contrary, it was reasonable and justifiable for appellant to assume that Mr. McMillan represented both Bellingham Coal Mines Company and appellee at the time the note was given, just as he did when the machinery was purchased, that all parties concerned were in accord, since Mr. McMillan had authority or apparent authority to act for both parties.

In *Moody v. Stubbs,* 94 Kan. 250, 146 Pac. 346, the court held that a surety who clothed the principal with apparent authority to arrange an extension of time has no just cause to complain although not in fact aware that the extension had been granted. To the same effect is *Foster v. First National Bank & Trust Co. of Tulsa,* 179 Okla. 496, 66 Pac. (2d) 79.

American Jurisprudence also approves this rule, stating:

> "It (consent) may be given by the surety in person or through an agent of the surety who is clothed with actual or apparent authority to give

such consent in behalf of the surety. A surety who has no knowledge of the extension of time cannot be said to acquiesce in or assent to it unless he has clothed the principal debtor or some other person with authority to arrange for an extension." 50 Am. Jur. 956, Sec. 72.

Also, it is not necessary that the surety expressly give his consent. In *Johnson v. Paltzer*, 100 Ill. App 171, the court stated:

"And the consent of the surety to the change in the terms of his obligation need not be by express agreement; it may be established by evidence of his passive acquiescence or ratification."

Wyke v. Rogers, supra, and *Gorman v. Dixon* supra, are additional authorities to the same effect

In 72 *C.J.S.* 660, Sec. 191, it is stated:

"And implied consent may be sufficient to preclude the surety from asserting the defense of extension of time, as where the surety's consent is inferred from the fact that he was instrumental in procuring the extension."

In *First Trust Co. v. Airedale Ranch & Cattle Co.* 136 Neb. 521, 286 N.W. 766, the court found the sureties to be estopped to claim a discharge on the ground that they did not consent to an extension of time. In that case four stockholders who were also officers of a corporation guaranteed the payment of the corporation's mortgage debt. These men sought and obtained an extension from the creditor. The men as sureties did not expressly consent to the extension

but the court held that the sureties were estopped to deny that they consented to the extension agreement.

In *Amidon v. Travers Land Co.,* 181 Minn. 249, 232 N.W. 33, a mortgagor sold the land to Elkin, who assumed the mortgage. Elkin was unable to pay as provided for in the mortgage and the mortgagor solicited and obtained an extension for Elkin, who gave a new note for the unpaid balance. The mortgagor subsequently claimed that he was released from payment of the mortgage because after the sale of the property to Elkin he became principal and the mortgagor surety and he had not consented to the extension of time. The court held that although the mortgagor was a surety he was estopped to deny that he consented to the extension because he was instrumental in obtaining the extension for Elkin. The court further stated that consent need not be in writing but may be shown by circumstantial evidence.

Finally, appellee has admitted that it agreed to the execution of the note. In its Third Affirmative Defense contained in the Amended Answer (R. 8), appellee alleges that a novation resulted from the issuance of the promissory note by Bellingham Coal Mines Company and that said novation released appellee. In discussing the elements of novation, American Jurisprudence states:

> "It is a well settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a

> such consent in behalf of the surety. A surety who has no knowledge of the extension of time cannot be said to acquiesce in or assent to it unless he has clothed the principal debtor or some other person with authority to arrange for an extension." 50 Am. Jur. 956, Sec. 72.

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> "It is a well settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a

> novation cannot be effected." 39 Am. Jur. 262, Sec. 17.

By alleging that a novation occurred by the issuance of a promissory note by Bellingham Coal Mines Company, appellee necessarily acknowledges and states that all parties have consented thereto. As to appellee's consent, this allegation constitutes an admission, and it is immaterial that appellee was unable to prove the consent of appellant and Bellingham Coal Mines Company at the trial. *Appellee's* admission establishes beyond question appellee's consent to the issuance of the promissory note, regardless of its ultimate legal effect. The discharge of appellee as surety is grounded upon the promissory note extending time of payment. Appellee cannot now assert that it did not consent to the issuance of the note, a position completely opposed to and inconsistent with that adopted in its verified pleadings.

Because of the dual capacity in which Mr. McMillan served and the close operating relationship between appellee and Bellingham Coal Mines Company, appellee must be deemed bound by the acts of its agent, Mr. McMillan. It was his duty to inform those with whom he dealt which one of two masters he was representing, if in fact he was not representing both. Appellee, having clothed Mr. McMillan with apparent authority to consent to the extension and having actively participated in procuring the extension, through Mr. McMillan, should be estopped to deny that the extension was with its consent.

6. Appellee Failed to Sustain Its Burden of Proving Its Affirmative Defenses.

The trial court found that appellee did not sustain the burden of proof as to Affirmative Defenses II and III. It is appellant's contention that neither has appellee sustained the burden of proving Affirmative Defenses I and IV. There is no substantial evidence to support the court's fourth finding (R. 11) and fourth conclusion (R. 14) that appellee received no consideration for the assumption of liability for the purchase price of the coal washing machinery. The only supporting evidence is the self-serving objectionable testimony of Mr. McMillan that appellee received no consideration (R. 176). On the other hand, Exhibit 2 shows that shipment of the coal washing machinery was to be via Northern Pacific Railway as far as possible. Further, it is clear that the machinery would not have been delivered by appellant without a full credit report on Bellingham Coal Mines Company had not appellee agreed to sign the contract and to pay for the machinery. In addition, by the acquisition of the machinery the management contract between appellee and Bellingham Coal Mines Company became more valuable. There was both a detriment to the promisor, appellant, and a benefit to the promisee, appellee. Appellee did not sustain the burden of proof and the trial court's Finding of Fact IV (R. 11) and Conclusion of Law IV (R. 14) are unsupported by any substantial evidence and are erroneous.

Further, with respect to this affirmative defense of no consideration, it was incumbent upon appellee to prove all the elements constituting that defense, namely the existence of the principal-surety relationship, an extension of time in fact, a binding agreement to extend the time of payment, and the non-consent to or non-acquiescence in the extension by appellee.

The rule is clearly stated in *American Jurisprudence:*

> "Where a surety claims to have been released by an extension of time granted to the principal by the creditor, the burden, it has been held, is on the surety to show that such extension was made without his consent. Moreover, the burden is on the surety to show a binding agreement based upon some new and valuable consideration which is sufficient to preclude the creditor from enforcing the instrument covered by the extension."

Similarly, in *Amidon v. Travers Land Co.,* supra, the Minnesota court stated:

> "However, upon appellant was the burden of proving that a valid extension was made without its knowledge and consent."

Also in *Graham v. Peppel,* 132 Miss. 612, 97 So. 180, it was stated:

> ". . . and the burden was upon the appellee (surety) to show a positive and binding agreement based upon some new and valuable consideration, which was sufficient to preclude the appellant from enforcing the note during the period covered by the extension."

As pointed out above, there was no extension of the time for payment, but merely the fixing of time for payment, none having previously been specified.

The agreement whereby appellee claims an extension of time to have been made was not an enforceable agreement, as noted above.

Finally, appellee has offered no evidence and the record contains none tending to show that the promissory note which constituted the extension of time was issued without the consent of appellee. No question was propounded to Mr. McMillan as to whether appellee consented to the issuance of the promissory note, and he made no statement that appellee did not consent. In short, the record is entirely lacking in evidence of any character tending to show that appellee did not consent to the issuance of the promissory note. Under this state of the record, the trial court's Finding of Fact VII (R. 12) and Conclusion of Law VI (R. 15) are erroneous because unsupported by any substantial evidence.

VI. CONCLUSION.

The contract for the machinery (Plf. Ex. 1), is unambiguous and therefore not subject to change or variation or explanation by parol evidence. Appellee is liable as purchaser or principal obligor having signed the contract in its own name without qualification or reservation. No signature or reference to Bellingham Coal Mines Company appears thereon.

Accordingly, it was error for the trial court to admit parol evidence for the purpose of showing that appellee signed the order in some capacity other than that which clearly appears on the writing.

Even considering the testimony and evidence admitted by the trial court, it further appears that appellee was primarily liable for the purchase price of the machinery, and received a valuable consideration for becoming such. Had not appellee agreed to become so bound, the machinery would not have been sold.

If, in fact, appellee was a surety for Bellingham Coal Mines Company for payment of the purchase price of the machinery, it occupied the status of a compensated surety. Appellee's parent corporation received freight revenues to which it would not have been entitled otherwise. The machinery sold increased the productive capacity of the coal mine, and, thus, added to the value of the management contract and lent greater assurance to appellee that it would be paid according to the terms of the management agreement. Appellee did not occupy the position of a mere stranger or even that of just a creditor of Bellingham Coal Mines Company. Appellee managed the coal mine which was the only productive asset and the only business of Bellingham Coal Mines Company. Appellee had a very great interest to protect and benefited greatly by the acquisition of the coal-washing plant, a vital component of the coal mining and marketing process. Accordingly, the rule of *strictissimi*

juris should not apply in this case, but, instead, the liberal rule relating to compensated sureties controls.

Finally, if it be determined that appellee is entitled to avail itself of the defenses accorded a voluntary surety, appellant submits that appellee has failed to sustain the burden of proving that there was a valid agreement for the extension of time and, further, that such contract was made without the consent of appellee. There was no extension of time because no date had been set in the contract (Plf. Ex. 1) when the purchase price would be due or payable. The promissory note fixing the time for payment was executed with the express consent of Mr. McMillan, the man with whom negotiations between appellant and appellee were had and the man who executed the contract for appellee. To now allow appellee to assert through Mr. McMillan that Mr. McMillan was not acting in the same capacities in which he originally dealt with appellant is unconscionable. If Mr. McMillan intended at the time the promissory note was executed and delivered to act only for Bellingham Coal Mines Company and not for appellee also as he had in the past, it was his duty to so inform appellant. Having failed to do so, appellee is estopped to deny its consent to the extension of time and to claim discharge of its liability to appellant.

Accordingly, appellant submits to the court that the judgment of the District Court dismissing appellant's complaint should be reversed and judgment entered against appellee in favor of appellant in the amount

of $48,445.47, the unpaid balance of the purchase price of the coal-washing machinery, plus legal interest from August 23, 1952, the day following completion of installation of the coal-washing machinery, together with its taxable costs and disbursements incurred in this court and in the District Court.

Dated, January 14, 1957.

Respectfully submitted,

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